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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
CATALINA YACHTS, INC.	)	
	)	
Respondent.	)	Docket No. EPCRA-09-0015
	)	
	)	
	)	
	)	

REPLY BRIEF OF CATALINA YACHTS, INC.

I. Preliminary Statement

The facts compel the conclusion that Region 9's proposed penalty of $162,500 is not appropriate. Region 9's "Proposed Findings of Fact, Conclusions of Law and Brief" ("Reg. 9's Brief") ignores most of the facts and most of the criteria to be used as guidelines in determining a fair and just penalty in this case. It confirms that Region 9 is interested solely in maximizing the civil penalty it will collect in this action. Such an approach should be recognized for what it is and rejected. It is neither fair, just, nor in accordance with the controlling guidelines used in determining the appropriate penalty for EPCRA reporting violations.

II. Reply Argument

A. Region 9 Has Not Met its Burden of Proof that its Proposed Penalty of $162,500 is Appropriate

Region 9 asserts that its proposed civil penalty of $162,500 "was calculated in accordance with the August 10, 1992, Enforcement Response Policy of Section 313 and Section 6607 of the Pollution Prevention Act" ("1992 ERP"), and that agency personnel "took into account" all the criteria set forth in Section 325(b)(1)(C) of EPCRA, 42 U.S.C. §11045(b)(1)(C). (Reg. 9 Br. at 7, ¶¶ 18 and 19.) The evidence in the record simply does not support this assertion.

With regard to the 1992 ERP, Region 9 admitted at the hearing that it did not consider two of its factors: the attitude (cooperation and compliance) of Catalina Yachts; and "other factors as justice may require." (Tr. 37:25 - 38:13; Exh. A, Tsai Decl. ¶ 9.) Region 9 further admitted that it ignored most of the criteria set forth in Section 325(b)(1)(C) of EPCRA. (Tr. 44:12 - 45:22; Exh. A, Tsai Decl., Exh.3.) It is undisputed that in setting the proposed penalty at $162,500 Region 9 considered only: (I) the fact that reporting violations were involved; (2) the volume of acetone and styrene Catalina Yachts used; (3) the size of the company in terms of employees and gross sales; and (4) the fact that acetone was delisted. During the cross examination of Ms. Tsai, Region 9's only witness and the person who calculated the penalty, admitted to Region 9's failure to consider most of the penalty adjustment criteria:

> Mr. Meeder: And in determining that [a proposed penalty of $162,500 was] appropriate, EPA considered first the nature of the violation, in the sense that it was a reporting failure, is that correct?
>
> A. That's correct.
>
> Q. It also considered the amount of chemical on-site, is that correct?
>
> A. Not the amount of chemicals on-site, but the amount of chemicals that get processed or otherwise used. . . .

Q. And it also considered the size of the company in terms of employees and gross sales, it that correct?

A. That's correct.

Q. And with regard to all other factors, it either didn't consider them or when it considered them, it dismissed them as not relevant to [the issues] in this case, is that correct?

A. At the time we calculated the proposed penalty, that's correct.

Q. And as you sit here today as well, correct?

A. That's correct.

(Tr. 44:12 - 45:22 (emphasis added.))

Under 40 CFR §22.24, *Region 9* has the burden of proving that the proposed civil penalty is appropriate. At the core of that burden is application of the "criteria set forth in the Act relating to the proper amount of a civil penalty" and consideration of "any civil penalty guidelines issued under the Act." 40 CFR §22.27(b). Thus, as Region 9 itself admits in its Brief, quoting Employers Insurance of Wausau and Group Eight Technology, Inc.(1997), TSCA Appeal No. 95-6, at 33, in order to meet that burden it must "demonstrate that it 'took into account' certain criteria specified in the statute, and that its proposed penalty is 'appropriate' in light of those criteria and the facts of the particular violations at issue." (Reg. 9's Br. at

27-28.)

It is undisputed that Region 9 did not "take into account" two important criteria set forth in the 1992 ERP and most of the statutory criteria. Thus, Region 9 has failed to meet its burden and establish a prima facie case for an appropriate penalty. On this basis alone, the claim for civil penalties should be dismissed.

B. Considering all Appropriate Factors, No Penalty Should be Assessed in this Case

1. Region 9's Refusal to Consider the Attitude Adjustment Factor Should Be Rejected

Region 9 seeks to dismiss the "attitude" adjustment factor (cooperation and compliance) as inapplicable "because of Complainant's practice of limiting application of the factor to settlement discussions." (Reg. 9's Br. at 26.) Just such an attempt to ignore the attitude factor was rejected by Chief Administrative Law Judge Henry B. Frazier, III in In re Apex Microtechnology, Inc., Doc. No. EPCRA-09-92-00-07 (May 7, 1993), 1993 WL256426 (E.P.A.) *6, which Region 9 unwittingly cites favorably in its Brief:

> I reject Complainant's contention that the attitude adjustment factor may be considered only during a settlement without a hearing. Such a restriction would prevent its consideration by the Administrative Law Judge following a hearing. I find no basis in the ERP for such a position.

As explained in Catalina Yachts' Opening Brief at pages 6, 7, 9, 13 and 14, it is undisputed that the employees of Catalina Yachts fully cooperated with EPA during the November 1993 inspection and thereafter promptly complied with EPCRA's reporting requirements. Such conduct supports a reduction of the proposed penalty by 15% for cooperation and 15% for compliance, or $52,500 (30% of $175,000). See In re Apex Microtechnology, supra, (holding that a 30% reduction for attitude was warranted).

2. The Nature and Circumstances of Catalina Yachts EPCRA Violations Compels A Significant Reduction of the Proposed Penalty

The undisputed facts concerning the nature and circumstances surrounding Catalina Yachts' EPCRA violations are summarized as follows: Catalina Yachts did not attempt to evade or ignore EPCRA's reporting requirements at any time. Rather, it failed to file seven reports because it was unaware of EPCRA's requirements. Prior to the November 1993 EPCRA reporting inspection, Catalina Yachts had never been contacted or received any correspondence from EPA. Catalina Yachts believed in good faith that all its air toxic reporting requirements were local, which it fully met by annually providing local regulatory agencies (the South Coast Air District and the Los Angeles Fire Department) with information concerning the use and release of acetone and styrene at its Woodland Hills plant. Catalina Yachts has

made extraordinary efforts over the years through its open house program to inform the local community concerning the materials used at its Woodland Hills plant. Catalina Yachts has never been cited for a reporting violation.

Region 9 offers essentially three arguments why these undisputed facts should not affect the proposed civil penalty: (1) EPCRA is a strict liability statute; (2) ignorance of the law is no defense; and (3) compliance with other environmental laws does not justify a reduction of the proposed penalty. (See Catalina Yachts' Opening Br. at 1-4.)

As to the first argument, the mere fact that the EPCRA imposes strict liability for its reporting violations does not mean that the maximum statutory penalty of $25,000 is mandatory. Indeed, the penalty provision at Section 325(c)(1) of EPCRA ("in an amount not to exceed $25,000 for each such violation") itself makes clear that the amount of the penalty is discretionary. Moreover, the EPCRA reporting violation case law teaches that the penalty is to be set in accordance with the criteria set forth at Section 325(b)(1(C), the application of which necessarily involves the exercise of discretion.

As to the second argument, the rule invoked by Region 9 to the effect that "ignorance of the law is no defense" has been historically applied only to issues of liability. Region 9 offers no authority to support its claim that such a rule generally

precludes consideration of the defendant's knowledge of the law in assessing a civil penalty, or in any way negates the nature, circumstance, or culpability factors in § 325(b)(1)(C).

Finally, the fact that the local air district, fire department, and community were supplied regularly with information concerning Catalina Yachts use of acetone and styrene is an important mitigation factor which goes directly to the nature and circumstances of the reporting violations. As the 1992 ERP itself states:

> The circumstance levels of the matrix take into account the seriousness of the violation as it relates to the accuracy and *availability of the information to the community, to states,* and to the federal government.

(1992 ERP, at 8; emphasis added.) Moreover, EPCRA "is intended to encourage and support emergency planning efforts at the State and local level and provide residents and local governments with information concerning potential chemical hazards present in their communities." Emergency Planning and Community Right to Know Programs, Interim Final Rule, 51 Fed. Reg. 41,570 (Nov. 17, 1986.), quoted in Region 9's Brief, at 18, fn 9. It is undisputed that this program goal was accomplished by Catalina Yachts.

Here, there is not a shred of evidence that Catalina Yachts in anyway attempted to avoid its EPCRA reporting obligations through a contrived ignorance

of the law. The record does establish that Catalina Yachts complied with all reporting obligations that were known to it. Although admittedly not in the proper form, it is undisputed that Catalina Yachts regularly provided information about the materials it used in the construction of sail boats to the community, the local air district, and the local fire department thereby accomplishing one of the central purposes of EPCRA.

In short, if the statutory penalty assessment criteria (nature and circumstances) are to have meaning, a further significant reduction of the proposed penalty is compelled by the undisputed facts. These two factors when coupled with the extent, gravity and degree of culpability factors are at least as important as the attitude factor which commands a potential 30% reduction and thus the proposed penalty should be reduced by at least an additional 30% or ($52,500).

3. Region 9's attempt to First Dismiss and then Confuse the Justice Factor is Without Merit

Region 9 asserts that the four past projects voluntarily undertaken by Catalina Yachts should not be considered in assessing the appropriate penalty because they do not qualify as supplemental environmental projects ("SEP") under EPA's 1995 Interim Revised EPA Supplemental Environmental Projects Policy which requires that such projects be undertaken by agreement in settlement of an enforcement

action. (Reg. 9's Br. at 42.)

Catalina Yachts has not invoked EPA's SEP policy. Rather, as explained in Catalina Yachts' Opening Brief, the "such other matters as justice may require" factor "vests the Agency with broad discretion to reduce the penalty *when the other adjustment factors [under the ERP] prove insufficient or inappropriate to achieve justice.*" In Re Spang & Company, EPCRA Appeal Nos. 94-3 & 94-4, Slip Op. at 27; emphasis original. Under this factor, voluntary projects which benefit the environment undertaken by respondents militate strongly in favor of reducing potential civil penalties:

> As a matter of policy, the Agency obviously looks favorably upon the undertaking of a project which benefits the environment and which goes beyond the requirements of environmental laws. By considering such behavior in a penalty assessment proceeding the Agency can provide an incentive for companies to engage in environmentally beneficial activities.

In Re Spang & Company, at 28.

Region 9 next argues that Catalina Yachts' voluntary environmental projects should not mitigate the proposed penalty because Catalina Yachts failed to prove those projects with "clear" and "unequivocal" evidence, citing the test set forth in In re Spang. (Reg. 9's Br., at 43-44.) At the core of Region 9's complaint about the nature of the evidence concerning Catalina Yachts' environmental projects is the

misguided notion that oral testimony is somehow in a lower evidentiary category than "documentary evidence such as checks, invoices and affidavit(s)." (Reg. 9's Br. at 45.) It is not.

The nature, cost, and impact of each of Catalina Yachts' projects was clearly and unambiguously testified to by Mr. Douglas. (See Catalina Yachts' Op. Br. at 9 - 11; Tr. 104 - 118.) Indeed, Region 9 acknowledges that Mr. Douglas' testimony concerning Catalina Yachts' environmental projects was "extensive." (Reg. 9's Br. at 38.) Region 9 was free to cross-examine Mr. Douglas on his environmental project testimony. For whatever reason, Region 9 did not cross-examine Mr. Douglas in any meaningful way on his environmental project testimony. His undisputed testimony is clear and unequivocal; it meets the In re Spang test.

Having failed to cross-examine Mr. Douglas, Region 9 next argues, *without any supporting evidence*, that Mr. Douglas failed to explain that by reducing acetone emissions Catalina Yachts was entitled to receive annual fee credits and created marketable emission credits. (Reg. 9's Br. at 46.) Region 9 then asserts that the trier of fact is entitled to have the "entire story" told and a clear statement of the net expenditures incurred or save by Catalina Yachts as a result of its elimination of acetone at its Woodland Hills facility. (Reg. 9's Br. at 46-47.) If Region 9 believes that Mr. Douglas misrepresented the costs (net or otherwise) Catalina Yachts

incurred in connection with its elimination of its use of acetone, which he did not, then Region 9 should either have cross-examined him on the issue or come forward with evidence to the contrary. Unsupported innuendo is neither evidence nor proper.

In short, Region 9's objections to Catalina Yachts environmental projects are not well founded. Catalina Yachts has incurred costs of $308,000 in connection with its past voluntary environmental works. It currently has ongoing future costs associated with those projects is between $91,000 and $106,000. It is in the interest of us all and particularly EPA, to encourage industry to undertake voluntary reductions of toxic air emissions, like those undertaken by Catalina Yachts. Such efforts fully justify a further significant reduction of the proposed penalty.

IV. Conclusion

The facts of this case, justice, and good government compel the conclusion that Catalina Yachts should not be penalized. A fair and just application of the relevant penalty adjustment criteria compels the same.

Dated: May 14, 1997

Beveridge & Diamond

By _____
James L. Meeder
Counsel for Catalina Yachts, Inc.

CERTIFICATE OF SERVICE

I hereby certify that the original copy of the foregoing **REPLY BRIEF OF CATALINA YACHTS, INC.** was hand-delivered to the Regional Hearing Clerk, United States Environmental Protection Agency, Region 9, and that a copy was sent by Federal Express to:

Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
401 M Street, S.W., Room 3706 (A-110)
Washngton, D.C. 20460

and by First Class Mail to:

David M. Jones, Esq.
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Date: May 14, 1997

Maria O. Earle

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May 14, 1997

VIA HAND DELIVERY

Steve Armsey, Regional Hearing Clerk
United States EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Re: Catalina Yachts, Inc.
No. EPCRA-09-94-0015

Dear Clerk:

Enclosed please find an original and one copy of the **Reply Brief of Catalina Yachts, Inc.** in the above-referenced matter.

Please file the original and return a filed-endorsed copy in the self-addressed, stamped envelope provided for your convenience. Thank you in advance for your assistance.

Sincerely yours,

Maria O. Earle

Maria O. Earle, Secretary to
James L. Meeder

me:

Enclosures